MOTION FILED
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No. 82-869
IN THE

Supreme Court of the United States

October Term, 1982

PHILIP ALAN FROUDE, *et al.*,

Petitioners,

vs.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., Granite State Insurance Company, AIU Insurance Company, The Insurance Company of the State of Pennsylvania, New Hampshire Insurance Company and Lexington Insurance Company hereby request to file the attached Brief Amicus Curiae regarding the Petition for Certiorari based upon the following:

1. Amici are insurance companies who have, at varying times, issued excess general liability policies to various manufacturers of products containing asbestos.

2. One or more of these amici have been sued by their insureds and other insurers in the following cases presently pending in the State Courts of California.

(a) *GAF Corporation v. Insurance Company of North America, et al.*, (No. C 286217) (Los Angeles County)

(b) *Armstrong Cork Company v. Aetna Casualty and Surety Company* (No. C 351357) (Los Angeles County)

(c) *Fireman's Fund Insurance Company v. Fibreboard Corporation, et al.*, (No. 753885) (San Francisco County)

(d) *Johns-Manville Corporation, et al. v. The Home Insurance Company, et al.*, (No. 765226) (San Francisco County)

3. In each of these cases the insured has, inter alia, sought a judicial declaration regarding the proper construction of certain terms of the respective policies. Specifically, the cases to a large extent turn on which coverage theory the California Courts will adopt in applying certain insurance policy language to various asbestos-related claims.

4. All four of these cases have been coordinated for all purposes before a single state judge pursuant to the California Rules of Court (designated as "Coordination Proceeding No. 1072"). The cases are presently in varying stages of pre-trial discovery.

5. In each case, amici have urged that the decision rendered in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, is the correct construction of their respective policies under applicable state law.

6. The consent of the attorneys for one or more parties has been requested but not obtained.

7. Amici believe that review by this Court is warranted and a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the

First Circuit. The decision of this Court may have a significant impact on the course of the litigation in California in which amici are parties.

Respectfully submitted,

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AMICUS CURIAE BRIEF.

Amici American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., Granite State Insurance Company, AIU Insurance Company, The Insurance Company of the State of Pennsylvania, New Hampshire Insurance Company and Lexington Insurance Company respectfully urge that this Court grant certiorari in this case.

REASON FOR GRANTING THE WRIT.

1. The Court of Appeals' Decision Regarding the Application of Insurance Coverage to Asbestos-Related Claims Directly Conflicts With Decisions of the Sixth, Fifth and District of Columbia Circuits and Seriously Impairs the Efficient Administration of Justice.

Efficient administration of asbestos-related claims in this country has been seriously impaired by the inconsistent decisions rendered by Federal Circuit Courts of Appeals. Virtually identical insurance policy language has been construed according to virtually identical principles of state law and three completely different decisions have been propounded (Fifth and Sixth Circuits — "exposure";[1] District of Columbia Circuit — "triple trigger";[2] First Circuit — "manifestation".[3]

Claimants, manufacturers, insurers and the state and federal courts in this country are all adversely affected by the confusion and inconsistency surrounding the handling of asbestos-related claims.

Declaratory relief litigation between manufacturers and their insurers has proliferated in recent years. Amici are aware of at least 30 such cases presently pending in various state and federal courts. Respondent herein, Eagle-Picher Industries, Inc. itself, has recently filed another declaratory

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[1] *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert denied* ___ U. S. ___, 102 S.Ct. 686 (1981); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert denied*, ___ U.S. ___, 102 S.Ct. 686 (1981).

[2] *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert denied*, ___ U.S. ___, 102 S.Ct. 1644 (1982).

[3] *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982).

relief action involving certain insurance policies not litigated in the First Circuit action. As long as this Court declines to review the varying Circuit Court opinions, insureds and insurers will continue to litigate the same issue over and over again throughout the courts of this country.

Underlying claimants are also adversely affected by this insurance coverage dispute. Typically, claimants name as many as 25 asbestos product manufacturers defendants in an underlying case. The resolution of these underlying claims is often delayed while the insureds and the insurers attempt to resolve their coverage problems. The number of underlying lawsuits only is well in excess of 10,000. The delay in resolving these lawsuits only further serves to congest our court system. Litigants, the courts and the public at large are suffering from this strain on the judicial system.

Amici suggest that this Court can make truly significant progress in resolving these problems of judicial administration by issuing a writ of certiorari in this matter and thereafter resolving the insurance coverage dispute facing both insurers and insureds. *Aldinger v. Howard*, 427 U.S. 1 (1976). Amici are mindful of boundaries placed on this Court in regard to matters of interpretation of state law. However, because of the drastic consequences on the administration of justice, amici believe that this is an "extraordinary case" contemplated by this Court in *Huddleston v. Dwyer*, 322 U.S. 232 (1944). As to such an extraordinary case, this Court has the power to resolve the conflicting decisions created in the Federal Circuit Courts of Appeals.

Conclusion.

Based on the foregoing arguments and authorities, amici pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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